SUPREME COURT, U. S.
FILED
OCT 30 1970
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 919

In the Matter of the Estate of Evelyn Komarr, Deceased:

ROBERT J. BEAUDRY,
Petitioner,

vs.

GEORGE VARGO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

ROBERT J. BEAUDRY
Attorney at Law
In His Own Proper Person
6110 West National Avenue
Milwaukee, Wisconsin 53214
Phone: 1-414 258 6540

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provision Involved	4
Statement of the Case How Federal Questions are Presented	4
Reasons Relied on For the Allowance of the Writ of Certiorari	6
Conclusion	13
Appendix A (Wis. Stat. 238.06)	App 1
Appendix B (Opinions and Judgment below)	App 3

CITATIONS

I. Cases:

A. Federal

New York Times Co. v. Sullivan (1964) 376 US 254, 11 ed 2d 686, 84 S Ct 710	6
Interstate Circuit v. Dallas (1968) 390 US 676, 20 L Ed 2d 225, 88 S Ct 1298	6

Page

II. Statutes:

Wis. Stat. 238.06 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

In the Matter of the Estate of Evelyn Komarr, Deceased:

ROBERT J. BEAUDRY,

Petitioner,

vs.

GEORGE VARGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Robert J. Beaudry, in his own proper person, respectfully petitions this Honorable Court for a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Wisconsin entered in the above entitled case on April 3, 1970 and re-affirmed on rehearing on June 2, 1970.

OPINIONS BELOW

The Decision on Objections to Will of the County Court, Milwaukee County, Wisconsin (Document 7 of Record) is unreported and is printed in Appendix B hereto, infra App. p. 4. The Opinion of the Supreme Court of the State of Wisconsin printed in Appendix B hereto, infra App. p. 11, is reported in 46 Wis. 2nd 230, (Document 14 of Record). The Opinion of the Supreme Court of Wisconsin on Rehearing printed in Appendix B hereto, infra App. p. 27 is reported in 46 Wis. 2nd, 230 (Document 17 of Record).

JURISDICTION

The Judgment of the Supreme Court of the State of Wisconsin was made and entered on April 3, 1970 (Appendix B, infra App. p. 11 (Document 14 of Record). A timely Motion for Rehearing was made (Document 15 of Record) and denied on June 2, 1970 (Appendix B, infra, App. p. 27 (Document 17 of Record).

Petitioner secured an order extending time for filing petition for Writ of Certiorari to October 1, 1970 (Document 18 of Record) and a second order extending time for filing petition for Writ of Certiorari to October 30, 1970 (Document 19 of Record).

The jurisdiction of this Honorable Court is invoked because the decision of the Wisconsin Supreme Court has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

A. Was the testratix's rights to equal protection of the law and due process of the law under the XIV Amendment of the United States Constitution violated when the Wisconsin Supreme Court retroactively invalidated the execution of her will by holding that the execution did not comply with their new standards regarding assistance in execution, to-wit:

1. "Where one does not expressly authorize another to assist him, such assistant should not be allowed to claim the use of the testator's hand was voluntary." (Appendix B, infra p. 18 App.)

2. Direction to assist the testator, like the direction to sign for him, must be actively, rather than passively expressed. (Appendix B, infra, p. 18 App.)

B. Was the lawyer-beneficiary-proponent's rights to equal protection of the law and due processes of the law under the XIV Amendment of the United States Constitution violated when the Wisconsin Supreme Court used a separate standard for proving undue influence as regards said lawyer-beneficiary-proponent, to-wit:

> "However, in Will of Cooper (1965), 28 Wis. 2d 391, 395, 137 N. W. Chief Justice HALLOWS, citing Will of Faulks, supra, also recognized 'the confidential relationship between the testator and the beneficiary coupled with "suspicious circumstances," ' as an independent theory or method of proving undue influence." (Appendix B, infra, p. 7 App.)

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Statute involved in this petition is: Section 238.06, Wis. Stats. This Statute is set forth in Appendix A, infra, p. 2 App.

The Constitutional provision is the XIV Amendment of the United States Constitution which states as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions were created by the decision of the Wisconsin Supreme Court and raised by the petitioner in his Motion for Rehearing and his brief in support of said motion. The Wisconsin Supreme Court is the highest Court in the State of Wisconsin in which decisions on this case can be heard.

The petitioner, Robert J. Beaudry, was the attorney and conservator for the late Evelyn Komarr who died on July 8, 1968. She was approximately 70 years of age at the time of her death.

Mrs. Komarr suffered a stroke on March 17, 1968. She was hospitalized for several weeks and returned to Mt. Carmel Nursing Home where she resided. Several weeks later, she suffered another stroke and returned to the hospital where she remained until her death in July.

On March 18, 1968, Evelyn Komarr made a bedside will leaving her estate (worth approximately $50,000) to the petitioner, Robert J. Beaudry. Her only heir was a son, George Vargo, of Royal Oak, Michigan. Mr. Vargo, for the most part never lived with his mother, with the exception of a short time as a young boy and for seven months in 1965. Mr. Vargo was estranged from his mother for sometime prior to her death. Mr. Beaudry retained the attorney who drafted Evelyn Komarr's will. The scrivener assisted her in making her mark (X). He instructed her to make an X and she in fact, made 2 X's. (Document 13 of Record).

Mr. Vargo last saw Mrs. Komarr on November 10, 1967 in the Milwaukee County Court, Probate Division, when Mrs. Komarr removed Mr. Vargo as her conservator over his objections and replaced him with the petitioner. From that day on, he had no communication or contact with Mrs. Komarr.

Mr. Vargo was never notified of Mrs. Komarr's hospitalization by the hospital, her nursing home or Mr. Beaudry who was under order of Mrs. Komarr not to notify Mr. Vargo.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The petitioner feels that the law as set out in New York Times Co. v. Sullivan, 376 U.S. 254, 11 L ed 2nd 686, 84 S Ct 710 applies to the reasons that follow, being cognizant that the present case has to do with wills and the New York Times case deals with libel. Further, your petitioner feels that the standards as to "unconstitutional vagueness" as set out in Interstate Circuit v. Dallas, 390 U.S. 676, 20 L Ed. 2nd 225, 88 S. Ct. 1298 are applicable here.

The present case affects the right of handicapped people to convey property by will -- -- and the right of lawyers to inherit, which includes the right of a testator to leave his property to any person of his own choosing.

The Wisconsin Supreme Court changed the existing rules with reference to execution of wills. After it changed the rules, the Court made its own Findings of Fact without remanding the case for further proceedings to the trial court. Next, the Wisconsin Supreme Court reversed the Findings of the trial Judge that there was no undue influence (on the part of the petitioner) and found that there was an inference of undue influence which was unrebutted and again made Findings of Fact without remanding the case to the trial court. The Wisconsin Supreme Court is the highest court in the State of Wisconsin. When the Wisconsin Supreme Court makes Findings of Fact, it denies the right to appeal its Findings of Fact, inasmuch as there is no higher court to appeal its Findings of Fact to.

Obviously, this discriminates against the person or persons who are affected by the action of the Wisconsin Supreme Court. The right to appeal is a valuable right -- when one is denied that right, he is discriminated against. Certainly to deny the right of appeal is discriminatory -- it is denial of the equal protection of the law and due process of law.

The right to own property and dispose of it by will is a fundamental right guaranteed by the 14th Amendment and it is the position of the petitioner that the decision of the Supreme Court of Wisconsin violates Mrs. Komarr's rights under the 14th Amendment in the following respect:

a. When Mrs. Komarr contracted for the services of an attorney to draft her will, she had a right to rely on the then-existing law with reference to execution. To permit the Wisconsin Supreme Court to change the rules of execution of a will after Mrs. Komarr's death (when she had no remedy) and invalidate her will is manifestly unjust and clashes with our basic concepts of equal protection of the law and due process of law.

b. Under the present decision of the Wisconsin Supreme Court, a physically handicapped person, mentally sound, yet not able to "expressly authorize" assistance or "actively express" direction for assistance in the making of one's mark or signature, cannot make a will. Such a classification is unwarranted, improper, unreasonable and discriminatory and therefore, unconstitutional.

c. The scrivener assisted Mrs. Komarr in making her mark (X). He instructed her to make her mark (X). She responded by making two marks

(XX). Obviously, the second X is her free and voluntary act and their new rule as promulgated by the Wisconsin Supreme Court has absolutely no relationship to the execution of Evelyn Komarr's will. It is unconstitutional for the Wisconsin Supreme Court to construe facts contrary to their obvious and clear meaning. The Wisconsin Supreme Court totally ignores the fact that Mrs. Komarr made two marks (XX) when she was instructed to make one mark (X). The decision is silent on the second X.

The lawyer-beneficiary-proponent's rights to equal protection of the law and due process of the law as guaranteed by the 14th Amendment have been violated by the Wisconsin Supreme Court. The Wisconsin Supreme Court has two standards to establish undue influence as evidenced from its opinion in this case.

> "In the instant case the trial court, also citing Faulks, supra, at page 360, correctly states that the existence of a confidential relationship between the testatrix and the favored beneficiary does not of itself constitute undue influence but when coupled with suspicious circumstances may give rise to an inference thereof. In Faulks, this court indicated such circumstances, although not exhaustive, included activity of the beneficiary in procuring the drafting and execution of the will, as well as any sudden and unexplained change in the attitude of the testator.
>
> "The trial court, although noting the testatrix's condition was such as to render her susceptible to undue influence and that Mr. Beaudry had had ample opportunity to influence her, did not find the circumstances surrounding the drafting

and execution of the will suspicious and therfore refused to invoke the inference of undue influence.

"As early as Will of Faulks, supra, this court noted the existence of a fiduciary relationship would cause courts to scrutinize the evidence more closely and weight it more carefully than it does in other cases. Although more recent decisions, such as State v. Horan, supra; State v. Eisenberg, supra; State v. Haberla, supra; and State v. Collentine, supra, involve disciplinary proceedings, they clearly indicate the light in which this court views fiduciary relationships. It is in such light that we view the conduct of Attorney Beaudry.

"In refusing to find Attorney Beaudry's conduct suspicious, the trial court noted he had not personally drafted the instrument and was not present at its execution. In response to this refusal the appellant argues that since Mr. Balistrieri had been retained by Mr. Beaudry, it matters little that he himself was not present. Despite this argument, the trial court's decision stated,' . . . There is no evidence to show that (Mr. Beaudry) instructed Mr. Balistrieri on how to draft this document. . .'

"The above statement is indicative of a failure to sufficiently consider this court's repeated pronouncement that because of acts of undue influence are usually done in secret, proof thereof must be based upon circumstantial evidence. Estate of Phillips (1961), 15 Wis. 2d 226, 231, 112 N. W. 2d 591. Obviously, if a beneficiary has either instructed the draftsman

> as to the contents of the will or has unduly influenced the testator as to the disposition of his property, he would not testify that he had done so."

The second standard is applied to the petitioner. Obviously, such a classification is unwarranted, improper, unreasonable, discriminatory and therefore, unconstitutional.

Further, the standards "confidential relationship" between the testator and the beneficiary coupled with "suspicious circumstances" are unconstitutionally vague, without standards and unreasonable.

What is meant by a "confidential relationship?"

The practice of law and the resultant duty of a conservator cannot be impugned by referring to such activities as "suspicious circumstances." The Supreme Court cannot attach "suspicion" to acts that are good or at least indifferent. It is improper to create a criminal law that attaches "suspicion" to ordinary acts done in the pursuit of one's work or profession and therefore, you cannot attach "suspicion" to such acts in a civil case.

The second standard as applied to the petitioner is patently unconstitutional.

As the basis for the court's "suspicious circumstances", it recites the following:

> "Viewed with the scrutiny which this court has previously recommended, we think the haste with which the document was drafted, the obviously weakened condition of the testratrix and

the failure to contact the testratrix's only son and sole heir of her hospitalization constitute suspicious circumstances, which, when coupled with Attorney Beaudry's fiduciary capacity, create an inference of undue influence."

"Haste with which the document was drafted."

What is the rule of "haste" -- how fast may you draw a will or how slow should you draw a will so that you are not guilty of haste. Obviously, the term is unconstitutionally vague, unreasonable and no standard at all. When one draws a will for a seventy-year old woman who has suffered a stroke, "Time is of the essence" to say the least -- to suggest that the scrivener delay preparing the document so that he not be guilty of haste is to suggest that he risk the chance of his client expiring before the client can execute the will.

A will is made in the mind of a client and at the best, takes but a split second--the physical preparation of the document does not control and direct the client's mind. Besides, what has the petitioner to do with the amount of time that the scrivener takes to prepare the will.

"The obviously weakened condition of the testratrix."

How weak was the testratrix -- was her mind weak as well as her body -- how weak must one be before it becomes a "suspicious circumstance?"

Again, obviously, unconstitutionally vague, unreasonable, and in fact no standard at all.

"Failure to contact the testratrix's only son and sole heir of her hospitalization."

Mrs. Komarr told the petitioner not to notify the son of her hospitalization. Because the petitioner followed her instruction, which he was duty-bound to do, he has developed and created a "suspicious circumstance." The petitioner owed no duty to Mr. Vargo. His duty was to Mrs. Komarr -- she was entitled to notify whoever she pleased about her hospitalization and to withhold the information from whoever she pleased. Mr. Vargo had no contact of communication with his mother from November 10, 1967 to her death on July 8, 1968. This includes Christmas, Valentine's Day, Easter and Mother's Day.

Mr. Vargo could have called Mrs. Komarr's nursing home any evening for 60 cents to find out about her condition. He could have mailed a post-card or a letter any day of the week. Mr. Vargo was not notified by Mrs. Komarr's nursing home, her hospital, her doctor, her priest. Yet, when her lawyer does not violate her direct order not to notify him, he is guilty of a "suspicious circumstance."

Again, we have an unreasonable, unconstitutional standard.

It is interesting to note that the Wisconsin Supreme Court substituted the word "fiduciary" for "confidential" as set out in the previous standard -- perhaps they are interchangeable -- perhaps they are not.

What constitutes "suspicious circumstance". Certainly the term is unconstitutionally vague, arbitrary, unreasonable and in fact, no standard at all.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT J. BEAUDRY
Attorney at Law
In His Own Proper Person

6110 West National Avenue
Milwaukee, Wisconsin 53214

Page

DOCUMENTATION OF RECORD

1.	Petition for Probate of Will, etc.	N. P.
2.	Objections to Probate	N. P.
3.	Order assigning case to Judge Merriam	N. P.
4.	Consent and Order for Substitution of Attorneys	N. P.
5.	Petition for Special Administration	N. P.
6.	Order Appointing Special Administrator	N. P.
7.	Decision on Objections to Will	App 4
8.	Order Admitting Will to Probate and for Issuance of Letters	N. P.
9.	Certificate of Probate and Last Will and Testament dated March 18, 1968	N. P.
10.	Notice of Appeal, Undertaking, Copy of Order Admitting Will to Probate, Power of Attorney, Certificate of Compliance and Certificate of Sheriff of Service on Attorney Beaudry	N. P.
11.	Certificate of Transmittal to Supreme Court of Register in Probate	N. P.
12.	Transcript	N. P.
13.	Exhibits	N. P.

		Page
14.	Opinion of the Supreme Court of Wisconsin	App 11
15.	Copy of Motion for Rehearing and Notice	N. P.
16.	Brief of Respondent in Support of Motion for Rehearing	N. P.
17.	Order Denying Rehearing	App 27
18.	Order Extending Time for Filing Petition for Writ of Certiorari to October 1, 1970	N. P.
19.	Order Extending Time for Filing Petition for Writ of Certiorari to October 30, 1970	N. P.
20.	Notification to Register in Probate to Certify	N. P.
21.	Petition for Writ of Certiorari	N. P.
22.	Certificate of Register in Probate	N. P.

APPENDIX A

APPENDIX A

Wis. Stat. 238.06

"How wills to be executed. No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other; if the witnesses are competent at the time of such attesting, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will if it be otherwise satisfactorily proved."

APPENDIX B

DECISION ON OBJECTIONS TO WILL

Evelyn Komarr died a resident of Milwaukee County on July 8, 1968.

A document has been offered for probate, dated March 18, 1968, as the Last Will and Testament of the decedent. Objections have been filed to the admission of this document by George Vargo, a son of the decedent, each objection being hereinafter stated.

After considering all of the testimony received, and the documentary evidence received, the following findings are made by the Court:

1. CONTENTION OF FAILURE TO PROPERLY EXECUTE WILL.

Objector in this area points to the requirements under Section 238.06, Wisconsin Statutes, particularly to the requirement that the will be signed by the testator or by some person in his presence and by his express direction, Objector's position being that there was a complete failure on the part of the Proponent to show that there was an express direction by the testatrix to the scrivener to sign her name. Miss Benedetta Balistrieri testified that Mrs. Komarr's hand was on top of her brother Joe's. When Joseph Balistrieri testified, he stated that Mrs. Komarr took the pen in her hand and he put his hand on top of hers and she made her mark. Under the statute the testatrix may, by express direction, have some person in her presence sign the document in her behalf. There is no evidence in this case that there was any express direction given by Mrs. Komarr to Attorney Joseph Balistrieri to sign her name in her behalf. But there is testimony

to the effect that her hand was used in the making of the mark which appears upon the document as her signature. There is confusion in the testimony between the attorney and his sister as to just how this mark was made. Obviously, both cannot be correct. Further, there is certainly sufficient reason for Attorney Balistrieri to have a better recollection of the incident, as it was his hand that was involved in the making of the mark. So it is found at this time that Mrs. Komarr took the pen in her hand, and that Attorney Balistrieri put his hand on top of hers, and that the mark was made while her hand was in actual contact and possession of the pen.

The rule laid down in the Will of Wilcox, 215 Wis. 341, must be recognized, and the participation of Mrs. Komarr in the making of the mark is here found to be sufficient to make it the act of the testatrix. It was the objective evidence of her assent and, considering her physical condition on that date, it was about as much participation in the act as the testatrix was physically capable of rendering. It is a sufficient satisfaction of the statutory requirement.

At this point it should be remembered that the testatrix was hospitalized just the day before the signing of this document, after having suffered a stroke, and was in a weakened condition. The record further shows that she had some facial paralysis and was not completely distinct in her speech. So the Court cannot find that the insertion of the name Joe, when it should have been George, in the will is not understandable under the circumstances that existed at that time. It cannot be found that this makes the will fatally defective because the scrivener failed to correctly write what she told him to write, assuming that she said "George."

2. CONTENTION OF LACK OF SOUND MIND AND MENTAL CAPACITY OF DECEASED.

It must be noted that at one time the decedent had been found to be mentally incompetent and placed under guardianship by the County Court of Milwaukee County. However, it is just as important to take note of the fact that before the decedent executed the contested will the Milwaukee County Court found her to be competent and terminated the guardianship. The most significant testimony with respect to the competency of the decedent at the time of the execution of the document would be the testimony of the attesting witnesses and the physician who was attending her at the time, Dr. Robert E. Callan. Note again being made at this point that just before the will was executed the decedent was admitted to Misericordia Hospital on March 17, 1968, suffering from the effects of a stroke. The hospital records would indicate that the admitting personnel did not obtain a history from the patient at the time of the admission. The Objector would have the court draw the conclusion that at the time of admission the patient was in such a mental condition that she was unable to supply it. In view of Dr. Callan's testimony on direct examination with respect to the taking of such a history, the court cannot look upon it as evidence of great weight, particularly when it is stacked up against the testimony of the attesting witnesses.

The testimony of Attorney Balistrieri and his sister both indicate that Mrs. Komarr was in full control of her mental faculties at the time the will was drafted and executed.

The court will have to note the weight to be given to the testimony of the scrivener of the will (particular attention is paid to Will of Rasmussen, 1 Wis. 2d 615). The testimony here is clearly that the testatrix was lucid and rational and that she understood what she was doing. I can find no reason in the record to question the credibility of this testimony. It is here found that the testatrix was of sound mind and of sufficient mental capacity to execute the will.

3. CONTENTION OF UNDUE INFLUENCE OF THE PROPONENT.

The Objector contends that there is a presumption where a testator leaves a bequest to an attorney that there is undue influence. In reviewing the Will of Faulks, 246 Wis. 319, and particularly pages 358 and 359, it would appear that the existence of a confidential relation between the testator and the favored beneficiary standing alone do not necessarily give rise to a presumption of undue influence, although it may cause the court to examine the case with greater scrutiny and may, when coupled with other circumstances, raise a presumption of undue influence. But the question must be determined, as in all other cases, by ascertaining whether the free agency of the testator has been destroyed. It would appear to be the general rule that undue influence is presumed and the burden of proof shifted so as to require the beneficiary to produce evidence which at least balances that of the contestant when, in addition to the confidential relation, there exist suspicious circumstances, such as the fact that the beneficiary took part in the preparation or procuring of the will, or actually drafted it or assisted in its execution, and that the testator was weakminded or in frail health and particularly susceptible to

influence, or that the provisions of the will are unnatural and unjust. (But before such a rule can be applied, it is necessary that the relationship between the parties be a fiduciary or confidential one and that the person occupying such a relation toward the testator take beneficial interest under the will).

Wisconsin law is quite clear with respect to counsel drafting a will in which the scrivener becomes a beneficiary. (See St. v. Horan (1963) 21 Wis. 2d 66; St. v. Haberle (1965) 39 Wis. 2d 334; St. v. Collentine (1968) 39 Wis. 2d 325; St. v. Eisenberg (1968) 29 Wis. 2d 233).

First off, it is noted that the will here was not drafted by Mr. Beaudry. He was not present at the time of the conference with Mr. Balistrieri and the decedent, nor at the time it was signed. There is no evidence to show that he instructed Mr. Balistrieri on how to draft this document. It is not necessary to review in detail the testimony about the drafting of this document. It is clear that when Mr. Beaudry found that he was to be a beneficiary, he did not actively participate in the drafting of it. He started to get out of the picture. The question is raised as to whether he got far enough out of the picture. Objector seems to take the position that it is fatal to the Proponent because the testator did not actively participate in choosing her own counsel for this purpose. Is it defective because Mr. Beaudry made arrangements with Attorney Balistrieri to meet the testatrix and draft it? Now, here is an elderly person, lying in a hospital, suffering from the effects of a stroke, with no family available to her. There is not one scintilla of evidence that she had any real acquaintance with any other attorneys or counsel. Wouldn't Mr. Beaudry have been derelict in his duty if he had refused to

obtain legal counsel for her? We cannot overlook her rights. We cannot criticize Mr. Beaudry just because he contacted an attorney whom he well knew, who had on occasions in the past worked with him, and who had actually represented him in personal legal matters.

The question of undue influence must be determined by ascertaining whether the free agency of the testatrix has been destroyed, and such evidence that is offered must be closely and carefully scrutinized. The contestant points to and emphasizes the apparent personal relationship between Mr. Beaudry and the decedent and asks that we consider the fact that the decedent was a guest in his home at Christmastime; that he gave her a present at that time, and that he gave her a present on Mother's Day; his visitation of Mrs. Komarr in the hospital as soon after he learned of that hospitalization as he could get to see her. Is this suspicious? Or is it just being sincerely interested in and nice to an elderly person? Is his asking the County Judge to act as a witness to the will suspicious? Particularly when the County Judge is a former partner of the beneficiary? Is the transporting of the attorney and his secretary to the hospital, making sure the young lawyer's office is covered in his absence, a suspicious situation? And is it more suspicious because this is the first time in this young lawyer's personal life that he drafts an instrument at bedside in longhand?

It is apparent and it would be naive to believe for a split second that Mr. Beaudry did not have the opportunity to exercise influence over this woman. Obviously, he had much contact with her. Obviously, too, her physical condition and her mental condition

were such that a person by devious means, being so inclined, could have "influenced her." But the question is: Was it done? Part of the answer to that question would be to determine whether the provisions of the will are unnatural or unjust. A first blush view of disinheriting her sole heir, the only child of the decedent, would make it appear to be unnatural. Yet, the only child of the decedent over the years would have seemed to have no really close relationship with his mother. After the guardianship was terminated and after he was relieved of his position as conservator, there was no close contact between mother and son. The evidence indicates that this mother-son relationship existed in blood only. During most of his life he had very little opportunity to develop a normal child-parent affection. In this case the will itself is not unnatural. There is evidence of a friendly relationship between the attorney and the testator. Because there is evidence of friendship and because of the additional ingredient of attorney-client relationship, or the conservator-conservatee relationship, must the court find that Proponent was conniving to exert his influence over the testatrix, especially when the standard of behavior of this trusteeship relationship must be very rigid and unbending? Is there sufficient evidence here to shift the burden over to the Proponent? After sifting back and forth through all of the evidence admitted, I find the Objector's position to be something like the little boy's marble bag that is rather well stuffed with marbles, but the string to close it, if there is any, is missing. Possibly it would be appropriate at this point to cite the statement contained in the Objector's brief made by Justice Ruark, 274 SW 2d 615, 621: "An inference born the bastard child of lone suspicion has no standing;"

The finding is made that the Proponent did not exert undue influence on the testatrix.

CONCLUSION

The document dated March 18, 1968 offered as the Last Will and Testament of Evelyn Komarr, Deceased, should be admitted to probate as such.

Dated this 23rd day of April, 1969.

BY THE COURT:

/s/ J. Tom Merriam
Acting County Judge

APPEAL

APPEAL from an order of the county court of Milwaukee county: J. TOM MERRIAM, County Judge of Washington county, Presiding. Order reversed and cause remanded with directions.

This is an appeal from an order admitting the will of Evelyn Komarr to probate.

On July 8, 1968, Evelyn Komarr, a widow sixty-eight years of age,[1] died, leaving her only son, George Vargo, as her sole heir. The immediate cause of her death was listed as pulmonary embolism due to cerebral and coronary thrombosis and generalized arteriocslerosis. Prior to her death

---

1/ There is some confusion as to deceased's date of birth, for while her death certificate listed May 15, 1900, as her birthdate, Milwaukee County Mental Health Center records listed both September 5, 1894, and May 15, 1901, as her date of birth.

Mrs. Komarr had been hospitalized on numerous occasions. Pursuant to a hearing before the Milwaukee county court, Mrs. Komarr was declared mentally ill and committed to the Milwaukee County Mental Health Center on May 25, 1964.

The application of her commitment had indicated the following:

> "She is very confused. She has a fear that someone will take something out of her house. She is living in extreme filth. Her dog ate the ashes of her deceased husband. She is unable to care for herself. She needs institutional care."

In a report made to the court by Drs. Robert E. Fitzgerald and Michael Kasak, these conditions were confirmed and senility was listed as the cause of her confusion and disorientation. Following Mrs. Komarr's commitment, her son George was appointed as her guardian.

On July 3, 1964, Mrs. Komarr was transferred to another division of the Mental Health Center, where she remained until January 7, 1965, when she was conditionally released in order to live with her son in Royal Oak, Michigan.

In November, 1965, Mrs. Komarr decided to return to Milwaukee and upon her return resided at the Mount Carmel Nursing Home. On March 17, 1968, she was taken by ambulance to Misericordia Hospital for emergency treatment. The impression of Dr. R. E. Callan who examined her at that time was that she had suffered a "cerebrovascular accident, probably due to cerebral hemorrhage."

Mr. Beaudry had known Mrs. Komarr since about 1960. He had represented her as an attorney and had drafted her will dated October 30, 1963. That will had bequeathed her entire estate to her then-living husband. Mr. Beaudry had initiated the proceedings in which Mrs. Komarr had been declared an incompetent. His law firm had also acted in the termination of the guardianship and the appointment of Mr. Beaudry as conservator for Mrs. Komarr in place of her son George Vargo.

Mrs. Komarr had been a dinner guest in the Beaudry home on Christmas of 1967, and he desceibed her as "a dear, good friend of mine." The Beaudrys gave her a bathrobe and slippers as a Christmas present.

On March 18, 1968, the day following her admission to Misericordia Hospital, Attorney Beaudry returned to his home following a trip out of town. As he drove into his driveway at about noon, he was met by his wife who informed him of Mrs. Komarr's hospitalization. He then went to his office but promptly left for the hospital, arriving about 1 p.m. In a matter of five or ten minutes he saw Mrs. Komarr and then proceeded to the Milwaukee county courthouse, arriving at about 2 p.m. He confered with Judge MICHAEL T. SULLIVAN in reference to making a will in which, despite the existence of a surviving son, he would be the sole beneficiary.

Mr. Beaudry then attempted to contact Attorney Roland J. Steinle, Jr., but being unable to do so, he retained Attorney Joseph Balistrieri and immediately drove both Balistrieri and his sister, Benedetta Balistrieri, to the hospital. After introducing them to Mrs. Komarr, Attorney Beaudry excused himself and waiting outside in his car while Attorney

Balistrieri proceeded to draft the will which named Beaudry as the sole beneficiary of her estate.

Although hospital records listed Mrs. Komarr's son as the responsible party, together with his home and business addresses and telephone numbers, he was not notified of her hospitalization. Not until after her death, on July 8, 1968, did Mr. Beaudry, her attorney and conservator, contact her son George. At that time he was informed that the funeral was to be held on the morning of Wednesday, July 10.

Subsequent to the death of Mrs. Komarr, Attorney Beaudry filed a petition in the Milwaukee county court for probate of the instrument dated March 18, 1968. Objections to the admission of the instrument for probate were then filed on behalf of her only son and sole heir, George Vargo.

Grounds for such objections were:

"1. That the said instrument was not duly executed by the said Evelyn Komarr, deceased, as her Last Will and Testament, in the manner provided by law.

"2. That at the time of the execution of said instrument, the said Evelyn Komarr was not of sound mind and had not sufficient mental capacity to make a will.

"3. That the execution of said instrument was procured by undue influence exercised over and upon the said Evelyn Komarr, deceased, by Robert J. Beaudry."

After trial, the court rendered its decision and ordered the will admitted to probate. From the order admitting the will to probate, George Vargo appeals.

Additional facts will be stated in the opinion.

HANLEY, J. The following issues are raised on this appeal:

(1) Was the purported will executed in conformity with sec. 238.06, Stats.;

(2) Was the purported will procured by undue influence thereby necessitating the denial of its acceptance for probate;

(3) Were the attorney-draftsman and his secretary incompetent, under sec. 885.16, Stats. (Dead Man's Statute), to testify as to the execution of the purported will; and

(4) Were certain of appellant's exhibits improperly excluded from evidence by the trial court?

Execution in Conformity with Sec. 238.06, Stats.

The appellant contends that the execution of the will is not in compliance with sec. 238.06, Stats. Although such contention normally raises an issue of fact, we are here presented with an issue of law.

The testimony discloses that at the time of the execution of the will, the testatrix had suffered a flaccid paralysis of the left arm and left leg. On the previous day she was not able to give the doctor any past medical history or any information in reference to the various systems of her body.

The record shows that on admission to the hospital her speech was slurred and garbled. The bedside notes of the nurse on March 18, 1968, the date that the instrument was allegedly executed, stated as follows:

> "P. 84. Speech is garbled @ times. Skin warm and dry . . . 'L' hand & arm appears completely flac[c]id. L. leg has some uncontrolled movement . . ."

From the evidence it clearly appears that Mrs. Komarr was physically unable to write her signature, or, unaided, even to make her mark. There is no evidence of an express direction that the scrivener make this mark for her.

Sec. 238.06, Stats., states in pertinent part:

> "No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and <u>signed by the testator or by some person in his presence and by his express direction,</u> and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other . . ." (Emphasis supplied.)

This statute was construed in <u>Will of Wilcox</u> (1934), 215 Wis. 341, 254 N.W. 529. There, as in the instant case, the testatrix, being aged and infirm, was aided in the making of her mark. The evidence indicated that the testatrix touched the pen while the scrivener made her mark. Since no

express direction to do so had been given by the testatrix, the question before this court was ". . . whether the touching of the pen by testatrix, as the scrivener made the mark, was a sufficient participation in the act to warrant a holding that the mark was that of the testatrix and not the scrivener. . . ." Will of Wilcox, supra, at page 343.

In resolving this question, the court stated, at page 343:

> ". . . It is our conclusion that such an execution satisfies the statute; that such a participation in the making of the mark, makes the act that of the testatrix. It furnished objective evidence of assent, and doubtless represented as much participation in the act as testatrix was physically capable of." (Emphasis supplied).

There is considerable disagreement as to whether Mrs. Komarr's participation in the making of the mark was sufficient to render it her act, rather than that of the scrivener. As to the testatrix's participation, there is conflict between the testimony of Joseph and Benedetta Balistrieri. While Joseph testified the testatrix had held the pen and he had put his hand on hers, Benedetta testified that Joseph had held the pen and the testatrix had placed her hand on his.

The trial court apparently accepted Joseph's version of the execution and applied the rule laid down in the Will of Wilcox, supra. In so doing, the trial court stated:

> "The rule laid down in the Will of Wilcox, 215 Wis. 341, must be recognized, and the participation of Mrs. Komarr in the making of the mark

> is here found to be sufficient to make it the act of the testatrix. It was the objective evidence of her assent and, considering her physical condition on that date, it was about as much participation in the act as the testatrix was physically capable of rendering. It is a sufficient satisfaction of the statutory requirement." (Emphasis supplied).

We agree with the trial court that, despite the inconsistent testimony of Joseph and Benedetta Balistrieri, there is sufficient evidence to establish compliance with the rule laid down in Will of Wilcox, supra. However, it is our considered opinion that such rule allows too great an opportunity for fraud and should thus be overruled.

We think that where one fails or is unable to in any manner expressly authorize another to sign for him, the statute's alternate requisite is not met by simply taking the testator's hand, as an inanimate object, and making his mark or signature. Where one does not expressly authorize another to assist him, such assistant should not be allowed to claim that the use of the testator's hand was voluntary. Under the rule of Wilcox, which sanctioned unrequested physical assistance of another, the requirement of sec. 238.06, Stats., could be met even though the testator had so nearly expired as to, in some cases, make it medically questionable whether he was in fact living at the time of the assistance. Because of the helplessness of the testator in such circumstances and the obvious opportunity for complete fraud, our previous decision in Wilcox is hereby overruled. Under the statute as we now view it, mere use of the testator's hand when executing the will does not furnish "objective evidence of assent." Direction to assist the testator, like the

direction to sign for him, must be actively rather than passively expressed.

We thus conclude that the execution in the instant case does not satisfy the provisions of sec. 238.06, Stats., as we now view them.

Undue Influence.

This court in recent years has had the responsibility of reviewing challenges of undue influence which resulted from the practice of attorneys making themselves or their relatives beneficiaries under wills which they themselves have drafted. Estate of Barnes (1961), 14 Wis. 2d 643, 112 N. W. 2d 142; Estate of Spenner (1962), 17 Wis. 2d 645, 117 N. W. 2d 641; Estate of Perssion (1963), 20 Wis. 2d 537, 123 N. W. 2d 465. In addition, it has been called upon to consider the imposition of discipline upon attorneys whose conduct caused such challenges or the risk thereof. State v. Horan (1963), 21 Wis. 2d 66, 123 N. W. 2d 488; State v. Eisenberg (1965), 29 Wis. 2d 233, 138 N. W. 2d 235; State v. Haberla (1968), 39 Wis. 2d 334, 159 N. W. 2d 11; and State v. Collentine (1968), 39 Wis. 2d 325, 159 N. W. 2d 50.

It has long been held to establish undue influence the contestant must prove: "(1) A person unquestionably subject to undue influence. (2) Opportunity to exercise such influence and effect the wrongful purpose. (3) A disposition to influence unduly for the purpose of procuring improper favor. (4) A result clearly appearing to be the effect of the supposed influence." Will of Faulks (1945), 246 Wis. 319, 361, 17 N. W. 2d 423. See also: Estate of Brehmer (1969), 41 Wis. 2d 349, 164 N. W. 2d 318, and Estate of Ritter (1969), 43 Wis. 2d 507, 168 N. W. 2d 588.

However, in Will of Cooper (1965), 28 Wis. 2d 391, 395, 137 N. W. 2d 93, Chief Justice HALLOWS, citing Will of Faulks, supra, also recognized "the confidential relationship between the testator and the beneficiary coupled with 'suspicious circumstances,' " as an independent theory or method of proving undue influence.

In the instant case the trial court, also citing Faulks, supra, at page 360, correctly states that the existence of a confidential relationship between the testatrix and the favored beneficiary does not of itself constitute undue influence but when coupled with suspicious circumstances may give rise to an inference thereof. In Faulks this court indicated such circumstances, although not exhaustive, included activity of the beneficiary in procuring the drafting and execution of the will, as well as any sudden and unexplained change in the attitude of the testator.

The trial court, although noting the testatrix's condition was such as to render her susceptible to undue influence and that Mr. Beaudry had had ample opportunity to influence her, did not find the circumstances surrounding the drafting and execution of the will suspicious and therefore refused to invoke the inference of undue influence.

As early as Will of Faulks, supra, this court noted the existence of a fiduciary relationship would cause courts to scrutinize the evidence more closely and weight it more carefully than it does in other cases. Although more recent decisions, such as State v. Horan, supra; State v. Eisenberg, supra;

State v. Haberla, [2] supra; and State v. Collentine, [3] supra, involve disciplinary proceedings, they clearly indicate the light in which this court views fiduciary relationships. It is in such light that we view the conduct of Attorney Beaudry.

In refusing to find Attorney Beaudry's conduct suspicious, the trial court noted he had not personally drafted the instrument and was not present at its execution. In response to this refusal the appellant argues that since Mr. Balistrieri had been retained by Mr. Beaudry, it matters little that he himself was not present. Despite this argument, the trial court's decision stated, ". . . There is no evidence to show that [Mr. Beaudry] instructed Mr. Balistrieri on how to draft this document. . . ."

The above statement is indicative of a failure to sufficiently consider this court's repeated pronouncement that because acts of undue influence are usually done in secret, proof thereof must be based upon circumstantial evidence. Estate of Phillips (1961), 15 Wis. 2d 226, 231, 112 N. W. 2d 591. Obviously, if a beneficiary has either instructed the draftsman as to the contents of the will or has unduly influenced the testator as to the disposition of his property, he would not testify that he had done so.

Viewed with the scrutiny which this court has previously recommended, we think the haste with which the document was drafted, the obviously

---

2/ Decided subsequent to drafting and execution of instrument here involved.

3/ Decided subsequent to drafting and execution of instrument here involved.

weakened condition of the testatrix and the failure to contact the testatrix's only son and sole heir of her hospitalization constitute suspicious circumstances, which, when coupled with Attorney Beaudry's fiduciary capacity, create an inference of undue influence.

Since such inference establishes a prima facie case and remains even though evidence is introduced to rebut it (Estate of Spenner, supra, at page 652; Schlichting v. Schlichting (1961), 15 Wis. 2d 147, 112 N. W. 2d 149), this court must determine whether the proponent Beaudry has sufficiently gone forward with the evidence.

As stated in Will of Cooper, supra, at page 402:

> " . . . One need not contradict the evidentiary facts giving rise to the inference but may introduce such facts as would permit the rejection of the inference of undue influence. . . ."

In Estate of Perssion, this court rejected the inference because of considerable testimony which established the testator as independent, strong willed, stubborn and not susceptible to the influence of the attorney-draftsman or his mother. In the case now before the court the record indicates, and the trial court found, that the testatrix was in a weakened condition and susceptible to undue influence.

In Estate of Spenner, supra, a cousin of the deceased was the attorney who drafted her will. There the attorney-draftsman overcame the inference of undue influence by establishing that the result accomplished by the will produced no special benefit for him as distinguished from other cousins of the deceased.

In the instant case, it is the position of the will's proponent that the inference has been overcome by evidence which indicated that the will was in fact not unnatural, Since the trial court did not invoke the inference of undue influence, its decision did not reach the question of the sufficiency of the proponent's evidence to overcome such inference. This court can therefore consider the sufficiency of such evidence firsthand without applying the standard normally applied on review.

In support of his contention that the will was not unnatural, the proponent Beaudry indicates that the testatrix's son had not lived with her during his childhood and had spent very little time with her during his adult life. In addition, he points to complaints of the testatrix that while her son was acting as guardian she was dissatisfied with his treatment of her, and statements she made at the hearing in which Attorney Beaudry was substituted for her son as conservator.

We think that when the evidence is scrutinized in light of previous decisions of this court concerning fiduciary relationships, such evidence tending to negate the apparent unnaturalness of the instant will is insufficient to overcome the inference of undue influence on the part of Attorney Beaudry.

We conclude the will cannot be admitted to probate as a valid last will and testament of the testatrix Mrs. Komarr.

In view of our holding on the admission of the will to probate, we do not reach the remaining issues.

By the Court. --Order reversed and cause remanded with directions to the county court in probate

to dismiss the probate proceedings of the last will and testament of Evelyn Komarr, dated March 18, 1968.

STATE OF WISCONSIN
IN SUPREME COURT

In re: Estate of Evelyn Komarr, Decd.:
George Vargo,

Appellant,

AGAINST

Robert J. Beaudry,

Respondent.

I, Franklin W. Clarke, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the Court by Justice Hanley on file in my office in the above entitled cause, and that it is a true and correct copy thereof, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 12th day of June A. D., 1970.

/s/ Franklin W. Clarke
Clerk of Supreme Court
State of Wisconsin

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday of August A. D. 1969, on the 94th day of the term, to-wit: On the Third day of April A. D. 1970, Present

E. Harold Hallows, Chief Justice, Horace W. Wilkie, Bruce F. Beilfuss, Nathan S. Heffernan, Leo B. Hanley, Connor T. Hansen and Robert W. Hansen, Justices of said Court, the following proceedings were had, Inter Alia, to wit:

In the Matter of the Estate of
Evelyn Komarr, Deceased:

George Vargo,
Appellant,

v.

Robert J. Beaudry,
Respondent.

Appeal from
County Court
MILWAUKEE
County, State of
Wisconsin

This cause came on to be heard on appeal from the order of the ~~Circuit~~ County Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit County of Milwaukee County, appealed from in this cause, be, and the same is hereby reversed, with costs against the said respondent___ taxed at the sum of Eight Hundred Eighty-Two Dollars and No Cents ($882.00)- -

And that this cause be, and the same is hereby, remanded to the said Circuit County Court with

directions to dismiss the probate proceedings of the last will and testament of Evelyn Komarr dated April 18, 1968.

STATE OF WISCONSIN)
Supreme Court)ss.

I. Franklin W. Clarke, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this 12th day of June, A. D. 1970.

/s/ Franklin W. Clarke
Clerk of the Supreme Court
of the State of Wisconsin.

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN

Franklin W. Clarke
Clerk

Madison, June 2, 1970

To Mr. Ray T. McCann
Milwaukee
Mr. Roland J. Steinle, Jr.
Milwaukee

Sir:--The Court today announced decision in your case as follows:

---

96 In re Estate of Evelyn Komarr, decd.:
Vargo v. Beaudry

Motion for rehearing denied with costs.

No opinion filed.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court.

SUPREME COURT, U. S.

No. 919

In the Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of the Estate of Evelyn Kennert, Deceased:

ROBERT J. BRADLEY,

Petitioner,

vs.

GEORGE VARGO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR RESPONDENT IN OPPOSITION

RAY T. McCANN
425 Caswell Building
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Phone: 1-414-276-3565
Counsel for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 925-6561

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Argument	6
I. The Questions Presented Were Not Properly Raised Below	6
II. The Petition Does Not Present Any Important Federal Question	6
III. Why the Writ Should Be Denied	8
Conclusion	10

CITATIONS

Cases

American Ry. Express Co. v. Commonwealth of Kentucky (1927) 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639	9
American Surety Co. v. Baldwin (1932) 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231	6
Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930) 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107	7

PAGE

Boys Markets, Inc. v. Retail Clerk's Union, Local 770 (1970) —— U.S. ——, 90 S.Ct. 1583, —— L.Ed. (2d) —— 6

Faulks, Will of (1945) 246 Wis. 319, 17 N.W. (2d) 423 4

Godchaux Co. v. Estopinal (1919) 251 U.S. 179, 40 S.Ct. 116, 64 L.Ed. 213 6

Henry v. State of Mississippi (1965) 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. (2d) 408, reh. den. 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed. (2d) 813 9

Herndon v. State of Georgia (1935) 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530, reh. den. 296 U.S. 661, 56 S.Ct. 82, 80 L.Ed. 471 6

Lincoln Fireproof Warehouse Company v. City of Milwaukee (1932) 287 U.S. 567, 53 S.Ct. 23, 77 L.Ed. 499 7

Lynch v. People of State of New York ex rel. Pierson (1934) 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 9

Magoun v. Illinois Trust & Savings Bank (1898) 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037 8

Martinson v. Brooks Equipment Leasing, Inc. (1967) 36 Wis. (2d) 209, 152 N.W. (2d) 849, 154 N.W. (2d) 353 6

Marvin v. Trout (1905) 199 U.S. 212, 26 S.Ct. 31, 50 L.Ed. 157 6

McGowan v. State of Maryland (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. (2d) 393 8

Radio Station WOW v. Johnson (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 569 ..... 6, 9

PAGE

Rice, Will of (1912) 150 Wis. 401, 136 N.W. 956 8

Schware v. Board of Bar Examiners of State of N.M. (1957) 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. (2d) 796 .. 8

Scripto, Inc., v. Carson (1960) 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed. (2d) 660 9

Tidal Oil Co. v. Flanagan (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382 7

Uren v. Purity Dairy Co. (1948) 252 Wis. 446, 32 N.W. (2d) 615, 33 N.W. (2d) 213 6

Wilcox, Will of (1934) 215 Wis. 341, 254 N.W. 529 5

Statute

Wis. stat. 238.06 ..... 4, 5

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 919

In the Matter of the Estate of Evelyn Kumarc, Deceased:

ROBERT J. BRAUDRY,

Petitioner,

vs.

GEORGE VARGO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Wisconsin Supreme Court and its denial of motion for a rehearing without opinion (App. B of Petition) are reported at 46 Wis. (2d) 230 and 175 N.W. (2d) 473.

JURISDICTION

The Wisconsin Supreme Court rendered its opinion on April 3, 1970. Rehearing was denied without opinion on June 2, 1970. Judgment was entered June 12, 1970. The petitioner first raised the federal questions presented in his Petition for certiorari in his brief in support of a motion for rehearing in the Wisconsin Supreme Court. The Petition for certiorari does not state on what ground this Court's jurisdiction is invoked. The petitioner apparently seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257 (3).

QUESTIONS PRESENTED

Has the Petitioner timely raised the federal questions in the courts below?

Does the due process clause of the 14th Amendment to the Constitution of the United States of America prohibit the Wisconsin Supreme Court from overruling a prior decision interpreting a state statute?

Does a state, in requiring that a transaction between an attorney and his client be characterized by the utmost honesty and good faith, deprive an attorney of equal protection of the law?

Does one have a federally protected right to make a will; and if so, did the decision below infringe that right?

Is the decision of the Wisconsin Supreme Court based on adequate non-federal grounds precluding further review by this Court?

STATUTE INVOLVED

The statutory provision involved is sec. 238.06 of the Wisconsin statutes. This statute requires all wills to be signed by the testator unless the testator expressly directs some other person to sign on his behalf. The statute is printed in Appendix A of the petition.

STATEMENT OF THE CASE

How Federal Questions Were Presented

The petitioner was Mrs. Evelyn Komarr's attorney and the conservator of her estate. On March 17, 1968, Mrs. Komarr was conveyed by ambulance from a nursing home to Misericordia Hospital in Milwaukee. The admitting diagnosis was cerebrovascular accident probably due to cerebral hemorrhage. The hospital records show that on March 18, Mrs. Komarr's speech was garbled and her left arm and hand were completely flaccid (Objectors Exhibits B and D).

On March 18, 1968, the petitioner retained Attorney Joseph Balistrieri to draft Mrs. Komarr's will. Mr. Balistrieri had previously represented the petitioner in other legal matters (R. 109). The will is a three-page document drafted in longhand by Attorney Joseph Balistrieri (Proponent's Exhibit 1). Mrs. Komarr purportedly signed the instrument by making two x's as her mark. The will was witnessed by Attorney Joseph Balistrieri and Benedetta Balistrieri, his sister and legal secretary. The will left Mrs. Komarr's entire estate to the petitioner and expressly disinherited her son "Joe Vargo." (The actual name of the respondent, Mrs. Komarr's son and sole heir, is George Vargo.)

The testimony of Joseph Balistrieri and Benedetta Balistrieri is in conflict as to the circumstances surrounding the execution of the will. Benedetta Balistrieri testified that her brother made the two x's while Mrs. Komarr's hand was in contact with his hand (R. 68, 90). Joseph Balistrieri testified that Mrs. Komarr made the x's while his hand was on top of her hand (R. 106, 114). Joseph Balistrieri and Benedetta Balistrieri did not remember whether Mrs. Komarr's paralyzed left hand was used (R. 91, 121). Neither Joseph Balistrieri nor Benedetta Balis-

trieri testified that Mrs. Komarr ever requested anyone to make her mark for her or to assist her in making her mark.

The County Court for Milwaukee County, overruling respondent's objections, admitted the will to probate.

The respondent appealed to the Wisconsin Supreme Court and argued that the will had not been executed in conformity with Wis. stat. 238.06 and that the petitioner had procured the execution of the will by exercising undue influence over the testatrix (Document No. 23).

Wis. stat. 238.06 provides:

> "No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and *signed by the testator or by some person in his presence and by his express direction*. . . ." (Emphasis supplied)

In *Will of Wilcox* (1934) 215 Wis. 341, 254 N.W. 529, the court held that a testatrix's touching of a pen while another makes her mark is sufficient participation by the testatrix in the execution of a will, so that she can be deemed to have "signed" the instrument within the meaning of Wis. stat. 238.06.

Respondent argued in the Wisconsin Supreme Court that the *Wilcox* case, *supra*, could be distinguished from the present case (Document No. 23). The petitioner argued that the will had been executed in conformity with Wis. stat. 238.06 as that statute had been interpreted in the *Wilcox* case, *supra*. (Document No. 24). The petitioner did not suggest that the United States Constitution prohibited the Wisconsin Supreme Court from holding that the will had not been executed in conformity with Wis. stat. 238.06.

The Wisconsin Supreme Court overruled its decision in *Will of Wilcox, supra* and held that the testatrix must do something more than merely have her hand in contact with the hand of the person who signs the will; otherwise a completely comatose testatrix could fulfill the requirements of the statute.

In *Will of Faulks* (1945) 246 Wis. 319, 17 N.W. (2d) 423, the court held that a more stringent standard should be applied in determining whether a will was a product of undue influence when a fiduciary relationship existed between the testator and the beneficiary. The petitioner did not argue that the Equal Protection clause of the 14th Amendment prohibited the states from making such a legal distinction between fiduciaries and non fiduciaries. Instead the petitioner cited *Will of Faulks, supra*, five times in his brief in an attempt to distinguish the case from the case at hand (Document No. 24).

The Wisconsin Supreme Court reversed the County Court for Milwaukee County and held: (1) The record showed that as a matter of law the will had not been executed in conformity with Wis. stat. 238.06 as it now interpreted that statute, and (2) The record showed as a matter of law that the petitioner had procured the execution of the will by exercising undue influence over the testatrix.

The petitioner did not raise *any* question arising under the United States Constitution until he submitted his brief in support of a motion for rehearing (Document No. 16). The brief was mainly addressed to questions of state law. The petitioner did make the general suggestion that the decision conflicted with the due process and equal protection clause of the 14th Amendment, but failed to cite any authorities in support of this contention.

ARGUMENT

I.

THE QUESTIONS PRESENTED WERE NOT PROPERLY RAISED BELOW

The petitioner raised federal questions for the first time in his brief on motion for rehearing in the Wisconsin Supreme Court. The Wisconsin Supreme Court does not consider issues raised for the first time on rehearing. *Martinson* v. *Brooks Equipment Leasing, Inc.* (1967) 36 Wis. (2d) 209, 152 N.W. (2d) 849, 154 N.W. (2d) 353; *Uren* v. *Purity Dairy Co.* (1948) 252 Wis. 446, 32 N.W. (2d) 615, 33 N.W. (2d) 213.

This Court does not consider questions raised for the first time in a petition for rehearing in a state court. *Radio Station WOW* v. *Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 569; *Herndon* v. *State of Georgia* (1935) 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530, reh. den. 296 U.S. 661, 56 S.Ct. 82, 80 L.Ed. 471; *American Surety Co.* v. *Baldwin* (1932) 287 U.S. 156, 163, 53 S.Ct. 98, 77 L.Ed. 231; *Godchaux Co.* v. *Estopinal* (1919) 251 U.S. 179, 180-181, 40 S.Ct. 116, 64 L.Ed. 213. General assignments of error, even when timely made, are insufficient to preserve constitutional questions for review. *Marvin* v. *Trout* (1905) 199 U.S. 212, 26 S.Ct. 31, 50 L.Ed. 157.

II.

THE PETITION DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION

1. The Wisconsin Supreme Court has, from time to time, re-examined its prior interpretations of statutes, as have other appellate courts, e.g., *Boys Markets, Inc.* v.

Retail Clerk's Union, Local 770 (1970) —— U.S. ——, 90 S.Ct. 1383, —— L.Ed. (2d) ——. The right of a state court to overrule a prior decision interpreting a state statute is no longer an arguably debatable question of constitutional law. *Lincoln Fireproof Warehouse Company* v. *City of Milwaukee* (1932) 287 U.S. 567, 53 S.Ct. 23, 77 L.Ed. 499; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930) 281 P.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

In *Tidal Oil Co.* v. *Flanagan* (1924) 263 U.S. 444, 44 S. Ct. 197, 68 L.Ed. 382, the Oklahoma Supreme Court overruled prior decisions interpreting state statutes setting forth the requirements for the execution of deeds. This Court said at 263 U.S. 450:

> ". . . The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law. . . ."

2. The petitioner was not denied equal protection of the law. The courts' traditional close scrutiny of any transaction between a fiduciary and the beneficiary of his trust is designed to protect a class peculiarly susceptible to being the victims of fraud and other forms of overreaching. In the present case the petitioner had a fiduciary responsibility toward an old and infirm woman, both as her attorney and as the conservator of her estate. The petitioner proceeded to turn this position of trust to his own advantage. The imposition of special requirements of honesty and good faith on attorneys and other fiduciaries is not wholly irrelevant to the achievement of valid state purposes and thus the petitioner has not been denied equal

protection of the law. *McGowan* v. *State of Maryland* (1961) 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. (2d) 393.

In *Schware* v. *Board of Bar Examiners of State of N. M.* (1957) 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. (2d) 796, Justice Frankfurter said in regard to the duties of an attorney:

> ". . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' " (352 U.S. at 247)

3. One of the "natural rights" of man secured by the Wisconsin Constitution is the right to make a will. *Will of Rice* (1912) 150 Wis. 401, 444, 136 N.W. 956. No similar right exists under the United States Constitution. In *Magoun* v. *Illinois Trust & Savings Bank* (1898) 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037, the Court said:

> "(T)he right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege,—and therefore the authority which confers it may impose conditions upon it."

Any right of Mrs. Komarr to make a will was not infringed. The Wisconsin Supreme Court held that the execution of the instrument was not her voluntary act, but the product of undue influence exercised over her by the petitioner.

III.

WHY THE WRIT SHOULD BE DENIED

The decision below is of little interest to anyone other than the parties directly involved. The decision, as in most will contests, turned on the particular facts presented by the record. The petitioner continues to argue in this Court that the Wisconsin Supreme Court misapplied prin-

ciples of state law to the facts in the record in finding the petitioner guilty of fraud. The Due Process clause of the 14th Amendment, however, does not protect the petitioner from an allegedly erroneous application of state law. *Scripto, Inc. v. Carson* (1960) 362 U.S. 207, 210, 80 S.Ct. 619, 4 L.Ed. (2d) 660; *American Ry. Express Co. v. Commonwealth of Kentucky* (1927) 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639.

No procedural error to constitutional proportions is alleged to have occurred in the trial of the case. The petitioner, in claiming that he was denied substantive due process of law, attempts to revive the ghosts of constitutional doctrines long since buried. The power of a state court to re-examine its prior interpretation of a state statute is no longer open to doubt. The power of a state court to closely scrutinize transactions between a fiduciary and the beneficiary of a fiduciary's trust has never been seriously questioned. Neither the holding that the will was not executed in conformity with Wisconsin law nor the holding that the will was the product of undue influence raises any federal question of substance. Each holding is an adequate independent, non-federal ground for the decision below precluding further review by this Court. *Henry v. State of Mississippi* (1965) 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. (2d) 408, reh. den. 380 U.S. 926, 85 S.Ct. 878, 13 L.Ed. (2d) 813; *Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 569; *Lynch v. People of State of New York ex rel. Pierson* (1934) 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. The decision below does not present any important questions of federal law and is not in conflict with any prior decision of this court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RAY T. MCCANN
Counsel for Respondent